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NURUL ATIKAH MUSTAFA KAMAL v. NURAZLINA SURIANI ZULKIFLY & ORS

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CIVIL SUIT NO: 21NCVC-01-04-2016]
26 FEBRUARY 2019

B

TORT: *Negligence – Duty of care – Injuries suffered by student of Maktab Rendah Sains MARA ('MRSM') – Basketball hoop snapped and collapsed onto student – School located within military camp – Operation of MRSM joint endeavour between MARA and Minister of Defence – Whether owed duty of care to plaintiff to ensure that premises, facilities and equipment safe and not defective – Whether there was breach of duty of care – Whether causal link proven*

C

TORT: *Vicarious liability – Personal injuries – Injuries suffered by student of Maktab Rendah Sains MARA ('MRSM') – Basketball hoop snapped and collapsed onto student – School located within military camp – Operation of MRSM joint endeavour between MARA and Minister of Defence – Whether Minister of Defence vicariously liable for negligence of teacher and principal of MRSM and MARA pursuant to doctrine of ratification*

D

TORT: *Vicarious liability – Personal injuries – Injuries suffered by student of Maktab Rendah Sains MARA ('MRSM') – Basketball hoop snapped and collapsed onto student – Whether MARA as statutory body vested with responsibility to manage and administer MRSM – Whether MARA vicariously liable for breach of duty of care owed by teacher to student*

E

TORT: *Vicarious liability – Government liability – Personal injuries – Injuries suffered by student of Maktab Rendah Sains MARA ('MRSM') – Basketball hoop snapped and collapsed onto student – Operation of MRSM joint endeavour between MARA and Minister of Defence – Whether Minister an 'officer of the government' – Whether Minister breached duty of care to student to ensure that premises, facilities and equipment safe and not defective – Whether Government of Malaysia vicariously liable – Government Proceedings Act 1956, ss. 5 & 6*

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This was a personal injuries claim for damages arising from the negligence of the defendants. The plaintiff was at the material time a Form 3 student at the Maktab Rendah Sains MARA Kem Terendak, Melaka ('MRSM'). The first defendant was a teacher at the MRSM, and was the plaintiff's health and physical education teacher, the second defendant was the principal of the MRSM and the third defendant, MARA, was a statutory body established under the Majlis Amanah Rakyat Act 1966 and was the body that managed and operated the MRSM. The MRSM was built within a military camp, Kem Terendak, which was owned and operated by the fourth and fifth defendants, the Minister of Defence and the Government of Malaysia respectively. The infrastructure, buildings and facilities within the MRSM, including the

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maintenance thereof, were within the control, supervision and purview of the fourth defendant. The plaintiff stated that the fifth defendant was vicariously liable for the acts and omissions of the first, second, third and fourth defendants. The plaintiff, whilst attending a physical education class conducted by the first defendant on a basketball court at the MRSM, suffered injury to her person when a portable basketball hoop/post snapped and collapsed onto her back. At the time of the incident, the plaintiff was sitting on the basketball court. The nature of medical injury to the plaintiff from that incident, *inter alia*, were: (i) severe fracture of thoracic 12 vertebra (T12); (ii) severe dislocation at T11-T12 vertebral level; (iii) paraplegia of the lower body secondary to the spinal injury; and (iv) incontinence – requiring continuous intermittent self catheterisation.

Held (first, second and third defendants 50% liable and fourth and fifth defendants 50% liable):

(1) The evidence clearly showed that fourth defendant was not merely the landlord of the MRSM, but had taken on the added responsibility of maintaining the buildings, facilities and equipment therein, including the basketball hoop/post which was the subject matter of this action. The operation of the MRSM was a joint endeavour between the third and fourth defendants, where both had their respective share of duties and obligations. Hence, the fourth defendant owed a duty of care to the plaintiff to ensure that the premises, and the facilities and equipment therein, were safe for the purposes for which they were meant to be used. Similarly, the first and second defendants as teacher and principal, the third defendant as the schools manager/operator, and the fourth defendant as owner of the school facilities, owed a duty of care to ensure that the damaged basketball hoop/post did not pose a danger to the MRSM students or cause injury to them. (paras 15, 18 & 19)

(2) Five days after the injury caused to the plaintiff, the fourth defendant proceeded to replace the obsolete and damaged basketball hoop/post with a permanent basketball hoop post. This clearly demonstrated that the fourth defendant was the principal and the third defendant was the agent when it came to the MRSM premises and the facilities and equipment therein. Therefore, the fourth defendant would also be vicariously liable for the negligence of the first, second and third defendants by virtue of the doctrine of ratification, which has its origins in the law of agency. (paras 20 & 21)

(3) The second defendant, as principal of the MRSM, ought to have ensured that proper signage were put up to warn the students of such danger, or to have the damaged basketball hoop/post removed altogether from the basketball court. There was clear breach of the duty of care when the first defendant carried on physical education classes in close proximity

to the damaged basketball hoop/post, and exposing the students, and in particular the plaintiff, to the danger and risk of injury from the collapse of the basketball hoop/post. Whereas, the fourth defendant, by his failure to ensure that the basketball hoop/post was promptly removed and replaced upon being notified of the defect, clearly breached the duty of care. (paras 22 & 24)

(4) It was not disputed that 'but for' the breach by the first to the fourth defendants' of their respective duty of care, the plaintiff would not have suffered the injuries and the damages. Further, by the failure to ensure that the aged and damaged portable basketball hoop/post was removed; and the failure to ensure that proper signage or notices were posted at the vicinity of the basketball court giving adequate warning, the first to third defendants had materially contributed to the plaintiff's injury. Hence, the plaintiff had successfully established the causal link between the first, second, third and fourth defendants' breach of duty of care and the damages suffered. (paras 27-29)

(5) The third defendant as the statutory body vested with responsibility to manage and administer the MRSM, including but not limited to the employment of teachers and selection of students and setting the rules and regulations governing the operations of the MRSM, would be vicariously liable for the breach of any duty of care owed by the teacher to the student. The breaches of duty of care by the first and second defendants, who were respectively teacher and principal of the MRSM, and who were under the employment of the third defendant, would clearly give rise to vicarious liability. (para 32)

(6) Vicarious liability of the government can arise both through the statutory provisions of ss. 5 and 6 of the Government Proceedings Act 1956, as well as based on common law principles of principal and agent; or employer and employee; or master and servant. The fourth defendant, the Minister of Defence, who was under the employ of the fifth defendant, the Government of Malaysia, had been identified as the tortfeasor and the vicarious liability of the fifth defendant had been clearly pleaded and admitted to, *albeit* conditionally, by the fourth and fifth defendants. Further, applying the *dicta* in *Kerajaan Malaysia & Ors v. Lay Kee Tee*, the fourth defendant, a Federal Minister, would definitely be an 'officer of the government' and s. 5 of the Government Proceedings Act 1956 would thus be applicable to cover any tortious acts of the fourth defendant and concomitantly assign liability to the fifth defendant. In the circumstances, the fifth defendant must jointly and severally bear the burden of the fourth defendant's liability. (paras 34, 36 & 40)

(7) The indivisible damage suffered by the plaintiff was the conjoined effect of separate and independent acts of the first, second, third and fourth defendants, who were independent tortfeasors. Each of them was jointly and severally liable for the whole of the damages sustained by the plaintiff. However, for the purposes only of any claim for indemnity or contribution *inter se* between the defendants, if the judgment was enforced by the plaintiff against any one, but not the other defendants, then, there would be a need to apportion the liability between the defendants. (para 41)

(8) The quantum of damages awarded to the plaintiff was allowed as proven. The sum of RM360,000 was awarded for pain and suffering and loss of amenities of life. As for the plaintiff's life expectancy, the court took 45 years as the remaining life expectancy of the plaintiff. The evidence showed that the plaintiff would need both domestic help and a driver and therefore, the sum of RM810,000 was allowed as costs of domestic help and driver. The court also allowed costs for hospital bed with high-low function and cof-side railing and mattress, pressure relieving mattress, wheelchair and commode wheelchair aluminium frame, wheelchair seat cushion, diapers, urinary catheter, incontinence sheets and clinical gloves. (para 44)

Case(s) referred to:

Bernard v. Attorney General [2005] 2 LRC 561 ***(refd)***
Bujang Mat & Anor v. Lai Tzen Hai & Anor [2004[4 CLJ 127 HC ***(refd)***
Canadian Pacific Railway Co v. Lockhart [1942] AC 591 ***(refd)***
Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA ***(refd)***
Clements v. Clements [2012] SCC 32 ***(refd)***
Dingle v. Associated Newspapers Ltd [1961] 2 QB 162 ***(refd)***
Dr Yusuff Mansur v. Changkat Jering Sdn Bhd & Anor [1997] 3 CLJ Supp 211 HC ***(refd)***
Dyre and Wife v. Munday & Anor [1895] 2 QB 742 ***(refd)***
Fitri Noor Samdin v. Siti Nooradawiyah Othman & Anor [2016] 2 PIR 49 ***(refd)***
Government of Malaysia & Ors v. Jumat Mahmud & Anor [1977] 1 LNS 29 FC ***(refd)***
Keppel Bus Co Ltd v. Sa'ad Ahmad [1972] 1 LNS 53 HC ***(refd)***
Keppel Bus Co Ltd v. Sa'ad Ahmad [1974] 1 LNS 62 PC ***(refd)***
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***
Koh Yen Bee v. American International Assurance Company Ltd [2000] 3 CLJ 28 HC ***(refd)***
Malaysia National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***
Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***
Mohd Raihan Ibrahim & Anor v. The Government of Malaysia & Ors [1982] CLJ 150; [1982] CLJ (Rep) 232 FC ***(refd)***
Mohamud v. WM Morrison Supermarkets Plc [2014] 2 All ER 990 ***(refd)***
Muhamad Nur Hemy Mohd Surah v. Mohamad Syahamirul Aizat Mohd Ali & Anor [2016] 1 PIR 66 ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***

Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor [2000] 4 CLJ 189 HC ***(refd)***
Ricketts v. Erith Borough Council [1943] 2 All ER 629 ***(refd)***
Samin Hassan v. Government of Malaysia [1976] 1 LNS 139 FC ***(refd)***
Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors [2002] 4 CLJ 776 CA ***(refd)***
Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***
Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Haji Abdul Razak [2018] 4 CLJ 361 CA ***(refd)***
Wheat v. E Lacon & Co Ltd [1966] AC 552 ***(refd)***
Wilson v. Tumman [1843] 6 M & C 242 ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***
Yeo Tin Sang v. Lim Choo Kee [1960] 1 LNS 164 HC ***(refd)***

Legislation referred to:
Federal Constitution, art. 132(1)
Government Proceedings Act 1956, ss. 5, 6
Interpretation Acts 1948 and 1967, s. 3

Other source(s) referred to:
Charlesworth & Percy on Negligence, 8th edn, paras 2-288

Reported by S Barathi

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is a personal injury claim for damages arising from negligence of the defendants. I had allowed the plaintiff's claim against the first, second, third and fourth defendants on the basis of joint and several liability and against the fifth defendant on the basis of vicarious liability. These are my grounds for that decision.

[2] The factual background to the plaintiff's claim is as follows.

[3] The plaintiff was at the material time a Form 3 student at the Maktab Rendah Sains MARA Kem Terendak, Melaka ("MRSM"). The first defendant was a teacher at the MRSM, and was the plaintiff's health and physical education teacher. The second defendant was the principal of the MRSM at the material time. The third defendant is a statutory body established under the Majlis Amanah Rakyat Act 1966 (Act 486) and was the body that managed and operated the MRSM. The plaintiff states that the third defendant is vicariously liable to acts and omissions of the first and second defendants.

[4] The MRSM was built within a military camp known as Kem Terendak, which was owned and operated by the fourth and fifth defendants, and the infrastructure, buildings and facilities within the MRSM, including the maintenance thereof, were within the control, supervision and purview of the fourth defendant.

[5] The plaintiff states that the fifth defendant is vicariously liable for the acts and omissions of the first, second, third, and fourth defendants.

[6] On 20 March 2013 at about 7.30am, whilst attending a physical education class conducted by the first defendant on a basketball court at the MRSM, the plaintiff suffered injury to her person when a portable basketball hoop/post snapped and collapsed onto her back. At the time of the incident, the plaintiff was sitting on the basketball court. It is undisputed that the nature of medical injury to the plaintiff from that incident is, *inter alia*, as follows:

(i) severe fracture of thoracic 12 vertebra (T12);

(ii) severe dislocation at T11-T12 vertebral level;

(iii) paraplegia of the lower body secondary to the spinal injury; and

(iv) incontinence – requiring continuous intermittent self catheterisation.

[7] Before commencement of trial, counsel for the plaintiff informed the court that the plaintiff and the first, second, and third defendants had come to a settlement where the first, second, and third defendants had agreed to pay a certain sum of money to the plaintiff. However, the plaintiff did not proceed to withdraw the claim against the first, second, and third defendants, but told the court that no matter what the outcome of the trial, the plaintiff would limit her claim for monetary damages against the first, second, and third defendants to the sum agreed between them. Hence, the first, second, and third defendants and their counsel did not participate in the trial.

[8] The following witnesses testified at trial:

(i) Nurul Atikah binti Mustafa Kamal (PW1);

(ii) Zariati binti Adnan (PW2);

(iii) Mustafa Kamal bin Omar (PW3);

(iv) Dr Ramnan Jeyasingam (PW4).

(v) Mohamed Khaidzir bin Mohamad Yusof (DW1);

(vi) Wishbone ak Thomas Tom (DW2);

(vii) Shuhamiza binti Mohd Shukor (DW3);

(viii) LT Kol (B) Mohd Zahari bin Abu (DW4); and

(ix) Dr Nurhasyimah binti Hisamuddin (DW5).

Duty Of Care

[9] In a claim for negligence, the plaintiff would have to prove, that:

(i) the defendant owed a duty of care;

(ii) the defendant breached that duty of care;

(iii) the breach occasioned the damage to the plaintiff;

(iv) the damages are not too remote.

See: *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958, CA.

[10] As between the plaintiff and first, second and third defendants, it is well-established that by virtue of the teacher-student relationship, there exists a duty of care of the part of teacher and school towards the student. This was reiterated by the Federal Court in *Government of Malaysia & Ors v. Jumat Mahmud & Anor* [1977] 1 LNS 29; [1977] 2 MLJ 103, as follows:

> It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take off his own children (see *Ricketts v. Erith Borough Council* [1943] 2 All ER 629, 631). It is not a duty to insurance against harm but only a duty to take reasonable care for the safety of the pupil.

Hence, the first defendant as the MRSM teacher, the second defendant as the MRSM's principal and the third defendant as the legal body that manages and operates the MRSM and the statutory body that employs the first and second defendants as its teaching and management staff clearly owe a duty of care to the plaintiff, a student who was enrolled in the MRSM.

[11] Now, as for the fourth and fifth defendants, the amended defence dated 22 August 2016 stated as follows:

> (a) Defendan Keempat (Menteri Pertahanan) bertanggungjawab dalam hal pentadbiran Kem Terendak, Melaka.
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> (b) Defendan Keempat (Menteri Pertahanan) bertanggungjawab menyelenggarakan bangunan yang melibatkan kejuruteraan awam, elektrikal, mekanikal, kumbahan dan anai-anai yang dilaksanakan oleh Bahagian Perkhidmatan Kejuruteraan Perkhidmatan Kem Terendak, bergantung kepada aduan dan/atau permintaan oleh pentadbiran Maktab Rendah Sains Mara dan juga bergantung kepada peruntukan kewangan oleh Kementerian Pertahanan. Defendan Keempat dan Kelima seterusnya menegaskan bahawa Maktab Rendah Sains Mara Kem Terendak juga mendapat peruntukkan bagi penyelenggaraan harta modal daripada Defendan Ketiga dan pihak-pihak lain yang memberikan sumbangan.

[12] Hence, there is clear admission by the fourth and fifth defendants in the pleadings that the fourth defendant and fifth defendants are the landlord of Kem Terendak on which the MRSM is situated. There is further admission that the fourth defendant is responsible for the administration and maintenance of infrastructure, including the MRSM building and its ancillary facilities, with funding from both the third and fifth defendants. Learned Senior Federal Counsel for the fourth and fifth defendants submits that the 4th and 5th Defendants do not owe any duty of care to the plaintiff because the occupier of the premise is the third defendant, who has exclusive possession of the MRSM, and argues that liability cannot be apportioned to the fourth and fifth defendants merely by virtue of the fact that the fourth and fifth defendants were the owners and maintainers of the facilities upon which the MRSM operated. Learned Senior Federal Counsel relies on the case of *Wheat v. E Lacon & Co Ltd* [1966] AC 552 in support of this contention.

[13] Now, I find that submission of the learned Senior Federal Counsel cannot be sustained because the evidence shows that the fourth and fifth defendants are not mere bare landlords who had tenanted out the premises to the third defendant. There is a history of collaboration between the third and fourth defendants from the inception of the MRSM up till its present operations. The evidence, both documentary and oral, established the following:

(i) the MRSM was established on 8 September 1980 based on an agreement between the third defendant and the Ministry of Defence;

(ii) the MRSM was established as a boarding school to cater primarily for children of armed forces personnel, where the physical infrastructure and school facilities will be provided for and maintained by the Ministry of Defence, under the fourth defendant, and the teaching faculty, administration and support staff will be provided by the third defendant;

(iii) DW1 had testified that:

(a) the MRSM was established by the Ministry of Defence in collaboration with MARA primarily for the benefit of the children of armed forces personnel and the decision to locate the MRSM in Kem Terendak, Melaka, ie, within an existing army camp, was a joint decision of both parties;

(b) a 'kertas kerja' or working paper dated 27 August 1980 for the establishment of the MRSM was prepared under the direction of the fourth defendant (pp. 2-31 of bundle D), wherein it is clear that the proposal was for the physical structures and school facilities of the MRSM to be owned and maintained by the fourth defendant, and the third defendant was to provide the teaching faculty as well as have overall supervision and control over the teachers and staff, and

attend to all aspects of academia, student affairs and administration of the MRSM for the benefit of the fourth defendant. The kertas kerja for the formation of the MRSM states:

> Memandangkan projek ini adalah projek Angkatan Tentera sendiri, senggaraan bagi bangunan tersebut akan menjadi tanggungjawab pihak Angkatan Tentera;

Hence, the duty and responsibility for the maintenance of the facilities rests solely with the fourth defendant.

(c) the '*Kertas Kerja*' also states that the fourth defendant had agreed to provide all facilities including the building infrastructure and sports facilities, as well as to maintain them in a state of good repair and provides clearly that:

> Kemudahan-kemudahan sukan dan perubatan dipanjangkan oleh Angkatan Tentera kepada kakitangan MRSM tersebut;

(d) at the MRSM's inception, the Ministry of Defence under the purview and direction of the fourth defendant had provided all the sports facilities and equipment for the students' use, and this includes the portable basketball hoop/post which fell and injured the plaintiff.

(iv) DW4 had testified that at the material time of the incident, he was the pegawai staf 1 senggaraan, in charge of the Bahagian Perkhidmatan Kejuruteraan Perkhidmatan, Pejabat BPKP Zon Selatan at Kem Terendak Melaka, and confirmed that the repair and maintenance of the MRSM buildings, infrastructure and facilities were under the responsibility of the said Bahagian Perkhidmatan Kejuruteraan Perkhidmatan ("BPKP") of the fourth defendant. DW4 further confirmed that this responsibility encompassed the maintenance of the sports facilities, including the portable basketball hoop/post that caused the injury to the plaintiff.

[14] The evidence further shows that:

(i) the entire MRSM infrastructure, educational and sporting facilities, including the portable basketball hoop/post that caused the injury to the plaintiff, were supplied and owned by the Ministry of Defence remained under the fourth defendant's purview and this was confirmed by DW4;

(ii) the third defendant knew as early as September 2011 that the said portable basketball hoop/post was in a state of disrepair, obsolete and unusable, and that it needed to be immediately replaced. This can be seen from the letter dated 26 September 2011 (p. 50 of bundle D) from the third defendant addressed to "Markas Angkatan Tentera Malaysia, Jabatan Arah Pendidikan, Kementerian Pertahanan, Jalan Padang Tembak, 50643 Kuala Lumpur" and copied to the "Bahagian

Perkhidmatan Kejuruteraan Pertahanan, Malacca". Attached to this letter is a schedule of proposed maintenance and repair works titled "Keperluan Senggaraan Sekolah Dalam Kem ATM 2011" and item 3 of the said schedule reads:

> Gelanggang Bola Keranjang – Membuat kerja-kerja menurap lantai simen dan **mengganti tiang gol yang telah usang (SEGERA)** (emphasis added).

This document, found at p. 51 of bundle D, clearly shows that the portable basketball hoop/post that caused the injury to the plaintiff needed to be replaced immediately. And further at p. 52 of bundle D is the Borang JP & P 4 raised by the third defendant, and forwarded to the relevant division under the fourth defendant's purview sometime in September 2011, which contains the request for approval to carry out several proposed maintenance and repair works, one of which carries the reference "JP & P 39 (Padang Bola Keranjang)" that describes the proposed repair works as:

> Menurap lantai simen yang baru dan **menggantikan tiang gol yang telah rosak**. (emphasis added).

Hence, contemporaneous documentary evidence shows that the fourth defendant's staff had been notified as early as September 2011 that the basketball hoop/post was damaged and needed to be replaced immediately.

(iii) DW4 stated in evidence that in 2010, there was only one basketball hoop/post on the basketball court in the MRSM and therefore the damaged basketball hoop/post that was requested to be replaced could only refer to the one that snapped and fell onto the plaintiff, injuring her.

(iv) DW1 and DW3 testified that the aforementioned request by the third defendant in 2011 to replace the damaged portable basketball hoop/post was not attended to by the Bahagian Perkhidmatan Kejuruteraan Pertahanan, which is under the purview of the fourth defendant, and was deferred to a later date because of lack of funds allocation.

[15] Hence, the evidence clearly shows that the fourth defendant was not merely the landlord of the MRSM, but had taken on the added responsibility of maintaining the buildings, facilities and equipment therein, including the basketball hoop/post which is the subject matter of this action. The evidence also shows that the operation of the MRSM was a joint endeavor between the third and fourth defendants, where both had their respective share of duties and obligations. This was definitely not a case of a pure landlord and tenant relationship, where the fourth defendant merely provides the buildings and infrastructure and the maintenance of it is left to the third defendant.

[16] In *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors* [2002] 4 CLJ 776, the facts were that, the second defendant, a local authority, had leased out a house to the first defendant, a school, which used the premises as a hostel for its students. A fire broke out at the said hostel and lives were lost as well as serious injuries sustained by its occupants. The Sessions Court had found both defendants equally liable. However, the High Court held that the first defendant was solely liable for the said incident on the premise and that the second defendant was not liable in tort, either in its capacity as landlord, or as a local council for failing to enforce the relevant building by-laws. The court had also found that the second defendant was not liable in contract. The Court of Appeal in allowing the appeal by the first defendant against the said decision, and reinstating the decision of the Sessions Court, held that:

(i) A landlord of premises stands in sufficiently close proximity to the lawful visitors of his tenant and under common law, a landlord owes a duty of care to the lawful visitors of his tenant.

(ii) A landlord owes a duty to the lawful visitors of his tenant to ensure that the premises let out is safe for the purposes for which they are meant to be used and the defect complained of by the entrant must be a defect which the landlord had knowledge or means of knowledge.

(iii) The second defendant as the landlord of the premises in question did owe a duty of care to the lawful visitors of his tenant and was in breach of that duty.

(iv) Whilst the tort of negligence does not generally impose liability for omissions, that principle is confined to only pure omissions.

[17] Learned Senior Federal Counsel argues by reference to the English case of *Wheat v. E Lacon & Co Ltd* [1966] AC 552 that the fourth and fifth defendants do not owe a duty of care to the plaintiff as they have parted control of the premises together with the facilities and equipment within the MRSM to the third defendant. The learned Senior Federal Counsel's argument is that since the fourth and fifth defendants have not retained any degree of control over the manner in which the facilities and equipment are used at the MRSM, a duty of care ought not be imposed on them in respect of its upkeep and repair.

[18] I am, with respect, unable to accept that argument. The fourth defendant had, as owner/landlord, in fact retained some degree of control over the facilities and equipment at the MRSM. The overall evidence shows that the basketball hoop/post was under the care and control of the fourth defendant and it was the duty of the fourth defendant to keep that equipment in a state of good repair. The evidence shows that any repair or replacement to the facility and equipment must have the fourth defendant's prior approval and done through or by the BPKP. Hence, it is clear that in keeping with the *dicta* of the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit*

Swee & Ors (*supra*), the fourth defendant owes a duty of care to the plaintiff, a student of the MRSM, to ensure that the premises, and the facilities and equipment therein, are safe for the purposes for which they are meant to be used. The degree of care that ought to be exercised depends among other matters, on the magnitude of risk to which a plaintiff is exposed in particular circumstances.

[19] The fourth defendant owes a duty to take all reasonable and proper steps to ensure that the facilities and equipment provided for the students' use at the MRSM by the fourth defendant is kept in state of good repair and is safe for their use, and that they kept safe from injury to their person. Thus, in *Mohamed Raihan Ibrahim & Anor v. The Government of Malaysia & Ors* [1982] CLJ 150; [1982] CLJ (Rep) 232; [1981] 2 MLJ 27, at pp. 234-236 (CLJ); p. 28 (MLJ), in respect of the duty of care exercisable by a teacher and/or school to its students, Salleh Abas FJ observed as follows:

> It is settled law that a school teacher is under a duty to exercise supervision over his pupils when they are in the school premises, either in the classroom or the playground. The degree of supervision depends on the circumstances of each case, such as the age of the pupils and what they are doing at the material time. If the teacher knows that the pupils are engaged in doing acts which are likely to cause injuries to one another, the teacher is under a duty to take steps to ensure the safety of the acts.
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> .....
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> In conclusion we are of the opinion that having regard to what we have discussed above, the respondents were therefore negligent for failing to take all reasonable and proper steps to prevent the appellant under their care from sustaining the injury and that their teacher did not check the condition of the garden tools nor provided a safe system of holding the gardening class.

Similarly, the first and second defendants as teacher and principal, the third defendant as the schools manager/operator, and the fourth defendant as owner of the school facilities, owe a duty of care to ensure that the damaged basketball hoop/post did not pose a danger to the MRSM students or cause injury to them.

[20] The documentary and oral evidence also show that five days after the injury caused to the plaintiff by the damaged and obsolete basketball hoop/post, the fourth defendant, through the BPKP, proceeded to replace it. In this regard, the third defendant made an urgent request to the fourth defendant *vide* Borang BPKP dated 25 March 2013 (p. 1 of bundle E) to carry out the following repair and maintenance works:

> Membuat kerja: Membaiki dan menyelenggara keseluruhan lantai gelanggang dan tiang gol bola keranjang (Kecemasan).

This borang BPKP dated 25 March 2013 carries a reference "JP & P 39 Gelanggang Bola Keranjang" which is the same reference found in the earlier request made in September 2011 (p. 52 of bundle D) for the replacement of the damaged basketball hoop/post, which was not attended to at that time, ostensibly for lack of funds. Following this after the event request on 25 March 2013, the fourth defendant carried out immediate repair works to the basketball court and replaced the obsolete and damaged basketball hoop/post with a permanent basketball hoop post. This clearly demonstrates that the fourth defendant was the principal and the third defendant was the agent when it came to the MRSM premises and the facilities and equipment therein.

[21] In this regard, over and above their liability as owner with a duty to upkeep the premises and facilities, the fourth defendant would also be vicariously liable for the negligence of the first, second, and third defendants by virtue of the doctrine of ratification, which has its origins in the law of agency. In the well regarded and authoritative text, *Charlesworth & Percy on Negligence*, 8th edn, paras 2-288, it is stated that:

> Liability of the principal may also be founded under the doctrine of ratification. Thus, if one person commits a tort, whilst acting on behalf of another person, *albeit* without his authority, and that other later ratifies the act, he becomes just as responsible for the wrong as if he had authorised it initially, before its commission.

That principle is derived from the old English case of *Wilson v. Tumman* [1843] 6 M & C 242, where Tindal CJ explains the doctrine of ratification as such:

> That an act done for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority.

Hence by the act of ratification, the agent is treated as having been authorised from the very beginning to act in the manner in which he did, and the principal would be liable for any foreseeable damage that flows from the act or omission that was ratified. See *Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor* [2000] 4 CLJ 189; [2000] 6 MLJ 551; and *Koh Yen Bee v. American International Assurance Company Ltd* [2000] 3 CLJ 28; [2000] 7 MLJ 278.

Breach Of The Duty Of Care

[22] Now, the next issue is whether the first, second, third and fourth defendants had breached their respective duty of care. The evidence is quite extensive that the first and second defendants knew very well that the

portable basketball hoop/post was obsolete and damaged, and that it needed to be replaced immediately. The first and second defendants knew that the damaged basketball hoop/post could pose a danger to the students and they ought to have taken the necessary precautions to ensure that students do not use it or even go near it. The second defendant, as principal of the MRSM, ought to have ensured that proper signage were put up to warn the students of such danger, or to have the damaged basketball hoop/post removed altogether from the basketball court. This they failed to do. And instead proceeded to have physical education classes in the proximity of this obvious danger. Hence, there was clear breach of the duty of care when the first defendant carried on physical education classes in close proximity to the damaged basketball hoop/post, and exposing the students, and in particular the plaintiff, to the danger and risk of injury from the collapse of the basketball hoop/post.

[23] The fourth defendant ought to have removed the damaged basketball hoop/post from the basketball court when they were notified of its state of disrepair by the second defendant. The fact that there was insufficient fund to attend to the repair to the basketball court and the replacement of basketball hoop/post does not absolve the fourth defendant of liability. Whilst waiting for the funds to become available or allocated by the fifth defendant, the fourth defendant could have taken proactive measures to remove the basketball hoop/post and the imminent danger that it posed to the staff and students of the MRSM.

[24] The fourth defendant did in fact expose the plaintiff to the risk of injury by his failure to ensure that the basketball hoop/post was promptly removed and replaced when the third defendant made a request for its replacement in September 2011. The defect to the basketball hoop/post was known to the fourth defendant, *via* the third defendant's notification since sometime in September 2011. Hence, there is clear breach of the duty of care on the part of the fourth defendant.

Causation

[25] In *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409, the Federal Court confirmed that in:

> ... a negligence claim, there must be a link between the wrongdoing and the damage caused. The burden of proving this link is on the plaintiff.

Hence, it is trite that in a claim for negligence, the plaintiff would have to establish on a balance of probabilities that "but for" the defendants' breach of duty of care, the injury and/or damage would not have occurred. This was reiterated by the Court of Appeal in *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29, in the following terms:

A

> It is trite law that in an action for negligence, the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed.

[26] However, where combined or several causes contribute to the B wrongdoing or harm, the 'but for' test may not be suitable. The 'material contribution' test may be more appropriate in such circumstances. Thus, the Supreme Court of Canada in *Clements v. Clements* [2012] SCC 32 had well summarised the legal test of causation as follows:

> ... the basic rule of recovery for negligence is that the plaintiff must C establish on a balance of probabilities that the defendant caused the plaintiff's injury on the 'but for' test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of 'material contribution to risk of injury', without showing factual 'but for' causation. As will be discussed in more detail below, this can occur in cases where it is impossible to determine which D of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact caused it. In these cases, the goal of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. Courts have therefore held the defendant liable on the basis that he materially contributed to the risk of E injury.

This pronouncement of the Supreme Court of Canada has been adopted and applied by Malaysian courts in several cases.

[27] The fact of the matter is that in the present case, the parties do not F dispute that the plaintiff's injuries and her current disabilities were caused by the portable basketball hoop/post collapsing and falling onto her back. The facts as discussed above show that but for the breach by the first to fourth defendants of their respective duty of care, the plaintiff would not have suffered the injuries and the damages sustained.

G **[28]** Apart from that, I also find that the first to fourth defendants have materially contributed to the plaintiff's injury by their failure to ensure that the aged and damaged portable basketball hoop/post is removed from the basketball court where the MRSM students carried on their school's extra curricular activities; and by their failure to ensure that proper signage or H notices are posted at the vicinity of the basketball court giving adequate warning as to the dangers posed by this aged and damaged basketball hoop/post which was in imminent danger of collapse. Further, the first to third defendants had materially contributed to the plaintiff's injury by failing to ensure that the MRSM students, and in particular the plaintiff who was under I their care, do not go near the said portable basketball hoop/post on account of the imminent danger posed by it to users and occupiers of the basketball court.

[29] Hence, I find that the plaintiff has successfully established the causal link between the first, second, third and fourth defendants' breach of duty of care and the damages suffered.

Vicarious Liability

[30] The general rule is that an employer is vicariously liable for a tort committed by an employee in the course of his or her employment. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority, his principal is jointly and severally liable with him. See: *Yeo Tin Sang v. Lim Choo Kee* [1960] 1 LNS 164. The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force in *Keppel Bus Co Ltd v. Sa'ad Ahmad* [1972] 1 LNS 53. The key to attributing vicarious liability is that wrongful act must have been done 'in the course of employment'. In *Samin Hassan v. Government of Malaysia* [1976] 1 LNS 139 the Federal Court explained the term 'in the course of employment' as follows:

> This appeal is concerned with the liability of the master for his servant. The master should shoulder the servant's liability if at the material time the servant was acting in the course of the employment and for the business of the employer. The meaning of the words 'in the course of employment" was fully considered by the House of Lords in *Davidson v. M Robb*, and the headnotes of the Law Reports read:
>
> > "In the course of employment" does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incidental to it and absence on leave for the workman's own purposes is an interruption of the employment (emphasis added).

[31] In determining vicarious liability of an employer for the acts of his employee, the English Court of Appeal in *Mohamud v. WM Morrison Supermarkets Plc* [2014] 2 All ER 990 approved of a two-stage test. The first stage involves a consideration of the relationship between the primary wrongdoer and the person alleged to be liable and whether that relationship is capable of giving rise to vicarious liability. The second stage relates to whether there is a sufficiently close connection between the wrongdoing and the employment so that it would be fair and just to hold the employers vicariously liable. Hence, the approach is to concentrate on the relative closeness of the connection between the nature of employment and the particular tort (*Bernard v. Attorney General* [2005] 2 LRC 561). This test found favour with our Court of Appeal in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653.

[32] The third defendant as the statutory body vested with responsibility to manage and administer the MRSM, including but not limited to the employment of teachers and selection of students and setting the rules and

regulations governing the operations of the MRSM, would be vicariously liable for the breach of any duty of care owed by the teacher to the student. The third defendant is also the employer of both the first and second defendants. Hence, the third defendant would be vicariously liable for injury caused to any third person arising from the acts or omissions of the first or second defendants that were carried out during their normal course of duty. Thus, the breaches of duty of care by the first and second defendants, who are respectively teacher and principal of the MRSM, and who are under the employment of the third defendant, would clearly give rise to vicarious liability.

[33] As for the vicarious liability of the fifth defendant, the learned Senior Federal Counsel submits that the fifth defendant is not vicariously liable for acts or omission of the fourth defendant for two reasons:

(i) Firstly, the Learned Senior Federal Counsel contends that the plaintiff has failed to identify the exact public officer who is said to be the tortfeasor, which according to the learned Senior Federal Counsel is necessary and vital in order to attribute liability vicariously to the fifth defendant. In this regard, the learned Senior Federal Counsel has referred to the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee* [2009] 1 CLJ 663; [2009] 1 MLJ 1.

(ii) Secondly, based on s. 5 of the Government Proceedings Act 1956, which states that "the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable ...", the learned Senior Federal Counsel submits that the fourth defendant, a Federal Government Minister is not a "public officer" within the meaning of s. 5 on account of the pronouncement of the Court of Appeal in *Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Haji Abdul Razak* [2018] 4 CLJ 361; [2017] MLJU 1941 to the effect that a Minister is a 'member of the administration' and not a 'public officer' within the definition accorded to it by s. 5 of the Government Proceedings Act 1956, read together with s. 3 of the Interpretation Acts 1948 and 1967, and art. 132(1) of the Federal Constitution. According to the Court of Appeal a 'public officer' by statutory definition only refers to a member of the 'public services' and not a 'member of the administration'.

[34] I am, with respect, unable to accept both the arguments. Firstly, the plaintiff has identified the fourth defendant, ie, the Minister of Defence, who is under the employ of the fifth defendant, the Government of Malaysia, as the tortfeasor. The Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee* [2009] 1 CLJ 663; [2009] 1 MLJ 1 held that:

> ... on the proper construction of ss. 5 and 6 of Act 359, *in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established before the*

government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government.

(emphasis added)

In the present case, I find that the tortfeasor, ie, the officer of the Government responsible for the alleged tortious act, has been properly identified and named as party, and that person is the fourth defendant. The plaintiff had pleaded in paras. 5 and 6 of the statement of claim as follows:

5. Defendan Keempat pada setiap masa yang material adalah pihak yang bertanggungjawab terhadap Kem Terendak, Melaka yang menyediakan dan menyelenggara kesemua bangunan, infrastuktur dan segala kemudahan yang terdapat di dalam Maktab Rendah Sains MARA Kem Terendak, 76200 Terendak, Melaka.

6. Defendan Kelima adalah Kerajaan Malaysia dan pada sepanjang masa yang material Defendan Pertama, Kedua, Ketiga dan Keempat adalah agen dan/atau pengkhidmat Defendan Kelima, Kerajaan Malaysia iaitu principal mereka dan dengan itu Defendan Kelima adalah pihak yang bertanggungjawab terhadap pengendalian, penyeliaan dan penyelengaraan segala urusan pelajaran dan pembelajaran di Maktab Rendah Sains MARA Kem Terendak, 76200 Terendak, Melaka dan bertanggungjawab secara vikarius ke atas semua tindakan-tindakan yang dilakukan oleh guru-guru khususnya guru yang terlibat secara langsung ketika proses pengajaran dan pembelajaran Plaintif.

And the fourth and fifth defendants in para. 2 of their defence dated 22 August 2016, in reply to the plaintiff's averment in para. 5 of the statement of claim, state as follows:

2. Perenggan 5 Pernyataan Tuntutan plaintiff adalah diakui setakat bahawa Defendan Keempat bertanggungjawab didalam hal pentadbiran Kem Terendak, Melaka, penyataan lain adalah dinafikan.

3. Merujuk perenggan 6 Pernyataan Tuntutan, Defendan Keempat dan Kelima menegaskan bahawa tanggungjawab vikarius hanya timbul jika syarat-syarat Seksyen 5 dan 6 Akta Prosiding Kerajaan 1956 dipenuhi.

4. Sebaliknya, Defendan Keempat dan Kelima menegaskan bahawa Defendan Keempat hanya menyelenggarakan bangunan yang melibatkan kejuruteraan awam, elektrikal, mekanikal, kumbahan dan anai-anai yang dilaksanakan oleh Bahagian Perkhidmatan Kejuruteraan Perkhidmatan Kem Terendak, bergantung kepada aduan dan/atau permintaan oleh pentadbiran Maktab Rendah Sains MARA dan juga bergantung kepada peruntukkan kewangan oleh Kementerian Pertahanan. Defendan Keempat dan Kelima seterusnya menegaskan bahawa Maktab Rendah Sains MARA Kem Terendak juga mendapat peruntukkan bagi penyelenggaraan harta modal daripada Defendan Ketiga dan pihak-pihak lain yang memberikan sumbangan.

Hence, from the totality of the pleadings and in particular the fourth and fifth defendants' defence, there is clear identification of the alleged tortfeasor, and the vicarious liability of the fifth defendant has been clearly pleaded and admitted to, *albeit* conditionally, by the fourth and fifth defendants.

[35] As for the argument that vicarious liability cannot attach to the fifth defendant because the fourth defendant is not a public officer, I do not find any substance in it. The fact remains that the fourth defendant is in charge of the maintenance of the buildings and infrastructure of the MRSM, as well as the facilities, and this has been admitted to in para. 4 of the fourth and fifth defendants' defence. There is clear admission that the fourth defendant would undertake the repair and maintenance of the facilities at the MRSM upon a request being made by the third defendant to the Bahagian Perkhidmatan Kejuruteraan Perkhidmatan Kem Terendak, which is under the purview of the fourth defendant. In fact, the third defendant had made written requests for the removal and replacement of the portable basketball hoop/post before and after its collapse that caused injury to the plaintiff, and this was finally attended to by the Bahagian Perkhidmatan Kejuruteraan Perkhidmatan. The fifth defendant, who is the fourth defendant's employer, and the ultimate owner of the premises where the MRSM is situated and the basketball court on which the collapsed portable basketball hoop/post had stood, is the principal of the fourth defendant, who is its agent.

[36] It is well-recognised by high authority that vicarious liability of the Government can arise both through the statutory provisions of ss. 5 and 6 of the Government Proceedings Act 1956, as well as based on common law principles of principal and agent; or employer and employee; or master and servant. These common law principles have been consistently applied by our courts such that they have become part and parcel of the body of Malaysian case law.

[37] The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force by the Singapore Court of Appeal in *Keppel Bus Co Ltd v. Sa'ad Ahmad* [1972] 1 LNS 53, which in turn had referred to the case of *Canadian Pacific Railway Co v. Lockhart* [1942] AC 591 at 599. This was affirmed by the Privy Council in *Keppel Bus Co Ltd v. Sa'ad Ahmad* [1974] 1 LNS 62; [1974] 1 MLJ 191 as follows:

> It is clear that the master is responsible for acts actually authorised by him for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all.
>
> But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them.

> In other words, a master is responsible not merely for what he authorises his servants to do, but also for the way in which he does it. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of his employment, but has gone outside of it.

[38] Suriyadi Halim Omar JCA (as he then was) in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653 CA, in finding the Government of Malaysia vicariously liable for the acts of the other defendants (government employees), applied the principles of vicarious liability enunciated in *Keppel Bus Co Ltd*, and had also referred to the *dicta* in *Dyre and Wife v. Munday & Anor* [1895] 2 QB 742, CA where Lord Esher MR ruled:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

And in the same case Lopes LJ remarked:

> The law says that for all acts done by a servant in the conduct of his employment, and furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

[39] The application of the common law principles of vicarious liability arising from an employer-employee relationship, independently of the statutory liability that is stipulated in s. 5 of the Government Proceedings Act 1956, was given tacit recognition by the Federal Court in *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425, where Ramly Ali FCJ held that:

> [66] The Government of Malaysia was named as the fifth defendant in the plaintiffs' action. The plaintiffs' claim against the fifth defendant was based upon the principle of vicarious liability applying to the fifth defendant as the employer of the third and fourth defendants; and the fifth defendant's duty to manage the disappearance of flight MH370 with due care, respect, transparency and accountability.
>
> [67] *The principle of vicarious liability is a principle at common law where one person is liable for the derelict of another. It applies to an employer and employee relationship. Thus, in law, an employer is liable for the damage caused by the delict of his employee, committed while acting within the course and scope of his duties as an employee. It is the duty of an employer to ensure that no one is injured or damaged by the employee's improper conduct or negligence in carrying on his work* (see: *Feldman (Pty) Ltd v. Mall* [1945] AD 733).

A [68] **Statutorily, the liability of the fifth defendant as the Government is governed by s. 5 of the Government Proceedings Act 1956**, which provides:

> 5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any
B public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall
C be deemed to be the agent of and to be acting under the instructions of the government.

[69] In the present appeal, having dismissed the third defendant's appeal, as a result of which the third defendant remains as a defendant to the plaintiffs' action, *we were of the view that the fifth defendant must also remain*
D *as a defendant in this action as named in the writ on the principle of vicarious liability and by virtue of s. 5 of the Government Proceedings Act 1956.* (emphasis added)

[40] Vicarious liability of the Government of Malaysia for the wrongful acts of its servants and/or employees and/or agents has been well recognised.
E This principle was applied to tortious wrongdoings by all government servants, employees and agents, without any class exception. To now take a narrow reading of the words "public officer" in s. 5 of the Government Proceedings Act 1956 and discard the application of this principle to certain class or categories of government employees, such as Ministers, would mean
F that the principle of vicarious liability becomes applicable only to wrongful tortious acts of certain classes of government servants or employees and not others. It would amount to selective application of a principle which had always been broadly and universally applied. This would also mean that for wrongful tortious acts of say a Minister, the Minister would have to be personally liable as the Government cannot be made vicariously liable. This
G cannot be the intended purpose of the legislation. The Legislature must have intended that the Government's vicarious liability must arise, without exception, from the wrongful tortious acts of all its servants, employees, and agents. It was for that reason that the Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee* [2009] 1 CLJ 663; [2009] 1 MLJ 1 had held that:

H
> ... on the proper construction of ss. 5 and 6 of Act 359, in any claim in tort against the government, **the officer of the government** who was responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal. (emphasis added)

I The use of the words "officer of the government" by the Federal Court in that judgment must have been deliberate, for it gives a much wider and clearer meaning to the term "public officer" as used in s. 5 of the

Government Proceedings Act 1956, such that the wrongful acts or omission of all officers of the Government, meaning all employees of the Government, and not just some, can give rise to vicarious liability. To interpret s. 5 of the Government Proceedings Act 1956 in any other way would result in absurdity. Applying the *dicta* of the Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee* (*supra*), the fourth defendant, a Federal Minister, would definitely be an "officer of the Government" and s. 5 of the Government Proceedings Act 1956 would thus be applicable to cover any tortious acts of the fourth defendant and concomitantly assign liability to the fifth defendant. And with that, the fifth defendant must jointly and severally bear the burden of the fourth defendant's liability.

Joint And Several Liability

[41] In the present case, we have a situation involving several independent tortfeasors. The question that arises is whether there ought to be an apportionment of responsibility between them under an order of court to determine the proportion of damage which each tortfeasor should pay. A similar question arose for consideration by the Federal Court in *Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351; [1997] 2 MLJ 165 and Edgar Joseph Jr FCJ held at p. 375 (CLJ); p. 186 (MLJ) as follows:

> ... at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage (see *Oli Mohamed v. Keith Murphy & Anor* [1969] 2 MLJ 244 at pp 245 col 2E to 246 col 1A, per Choor Singh J applying *Dingle v. Associated Newspapers Ltd & Ors* [1961] 2 QB 162 and *Drinkwater v. Kimber* [1952] 2 QB 281).

In *Dingle v. Associated Newspapers Ltd* [1961] 2 QB 162 Devlin LJ said at p. 188:

> ... Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. *As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury*. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have

A given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law ... .

(emphasis added)

B Applying this well-established principle, since the indivisible damage suffered by the plaintiff is the conjoined effect of separate and independent acts of the first, second, third and fourth defendants, who are independent tortfeasors, each of them is jointly and severally liable for the whole of the damages sustained by the plaintiff. However, for the purposes only of any C claim for indemnity or contribution *inter se* between the defendants, if the judgment is enforced by the plaintiff against any one but not the other defendants, then there would be a need to apportion liability between the defendants. In that regard, based on the respective breaches of duty of care, I find that the first, second and third defendants are 50% liable and the fourth D and fifth defendants are 50% liable.

Plaintiff's Injuries And Disabilities

[42] The various medical reports and evidence tendered by the plaintiff show that as a result of the injury sustained from the falling/collapsed basketball hoop/post, she suffered the following medical injury/conditions: E

(i) Spinal cord injury.

(ii) Fracture dislocation of T11/T12 with severe anterolisthesis with spinal canal stenosis.

F (iii) Fracture of eight and ninth ribs.

(iv) Complete paralysis of both lower limbs.

(v) Sensory impairment below umbilicus.

(vi) Complete loss of sensations below groin fold.

G (vii) Neuropatic pain – both lower limbs.

(viii) Urinary incontinence with partial urinary retention.

(ix) Constipation requiring alternate day enema administration.

(x) Fecal incontinence. H

[43] Further, evidence also shows that as a result of her medical injuries/condition, the plaintiff:

(i) cannot enjoy free movement as a result of the lower limb paralysis and needs a wheelchair to move about; I

(ii) cannot lead the life of a normal person;

(iii) needs to make lots of adjustments to her daily routine;

(iv) lost the chance of continuing her studies at the MRSM Kem Terendak as the buildings and facilities were not wheelchair friendly and as such had to transfer to another school in Seremban;

(v) would have lesser prospects of marriage;

(vi) can only have passive sex and would not be able to experience the pleasures of sexual relations; and

(vii) though a paraplegic can conceive children, but it would be extremely difficult for her to take care of them, especially in the initial years.

Damages

[44] The principle of law as it relates to the award of damages for personal injuries is that it is compensatory in nature, as was reiterated by the Federal Court in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324, in the following terms:

> It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate. *British Transport Commission v. Gourley (supra)* and *H. West & Son Ltd v. Shephard* [1963] 2 All ER 625. The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant. (Per Sir Alexander Cockburn, L.J. in *Phillips v. South Western Railway Co* [1879] 4 QBD 406.

Thus, in assessing the quantum of damages to be awarded to the plaintiff, I have taken guidance from the above pronouncement of the Federal Court.

(i) Special damages

The following items under special damages were allowed as they have been proved:

(a) Cost of medical reports	- RM2,080
(b) Travelling expenses to Hospital Melaka (RM100 × 20 days)	- RM2,000
(c) Travel expenses to Seremban Hospital (RM50 × 33 days)	- RM1,650
(d) Travel expenses for follow-up at Seremban Hospital (RM50 × 69 days)	- RM3,450
(e) Travel cost to Seremban Hospital 6 monthly rehabilitation for 26 years, ie, until the age of 45 at RM100 per year	- RM2,600
(f) Medical expert (PW4) attendance cost for court appearance	- RM2,385
	Total RM14,165

(ii) General damages

(a) Pain and suffering and the loss of amenities of life

(1) The learned counsel for the plaintiff submits that in *Fitri Noor Samdin v. Siti Nooradawiyah Othman & Anor* [2016] 2 PIR 49, the plaintiff suffered paraplegia with bladder and bowel incontinence, and the court awarded the sum of RM350,000 as general damages for pain and suffering and contends that in keeping with the current trend of award for such injuries, a sum of RM400,000 ought to be awarded. Further, learned counsel submits that there ought to be an additional award of RM10,000 for the two broken ribs suffered by the plaintiff on account of the award of RM4,000 for one fractured rib in *Muhamad Nur Hemy Mohd Surah v. Mohamad Syahamirul Aizat Mohd Ali & Anor* [2016] 1 PIR 66.

(2) The learned Senior Federal Counsel on the other hand argues that a sum of RM250,000 be awarded globally for pain and suffering. However, I have noted that the cases referred to by the learned Senior Federal Counsel are much older than that referred to by learned counsel for the plaintiff. The court must have regard to the current trend of awards for compensation in personal injury cases. See *Dr Yusuff Mansur v. Changkat Jering Sdn Bhd & Anor* [1997] 3 CLJ Supp 211; [1997] 5 MLJ 530. The plaintiff's condition is not too dissimilar from *Fitri Noor Samdin v. Siti Nooradawiyah Othman & Ano*r and in keeping with the general trend of awards, I find that the global sum of RM360,000 for pain and suffering arising from paraplegia with bladder and bowel incontinence (neurogenic bladder and bowel), urinary tract infection, as well as the two broken ribs, would be fair and reasonable under the circumstance. Thus, the sum of RM360,000 is awarded for pain and suffering and loss of amenities of life.

(b) Cost of future care

(1) The plaintiff's life expectancy

According to the testimony of PW4 and DW5, taking into account the plaintiff's age and medical condition, they opined that her life expectancy would be for another 43 to 45.5 years from the date of the injury.

Learned Senior Federal Counsel relying on *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004[4 CLJ 127; [2004] 6 MLJ 376, submits that there ought to be a deduction of 1/3 for contingency and vicissitudes of life on the remaining years, and hence according to the learned Senior Federal Counsel the multiplier would be 27 for the remaining years of purchase.

However, learned counsel for the plaintiff argues that the evidence of the experts was that the plaintiff is expected to live for another 45 years and that should be the multiplier in determining her cost of future care and counsel further argues that there should be no further deduction for contingencies as no evidence for this deduction was ever lead by the defendants.

I have taken 45 years as the remaining life expectancy of the plaintiff, which is also based on chart (exh. P20) referred to by PW4, and I find that this is the proper multiplier for calculating cost of future care.

(2) Cost of domestic helper/driver

The learned Senior Federal Counsel submits that the sum to be awarded for the domestic helper should be RM162,000 (RM500 x 27). However, learned counsel for the plaintiff submits that the cost of an Indonesian domestic helper is RM750 per month as confirmed by PW4, and the cost of a driver is RM750 per month. There is evidence to show that the plaintiff will need both domestic helper and a driver. I therefore allowed the sum of RM810,000 as cost of domestic helper and driver – RM1,500 × 12 × 45 = RM810,000.

(3) Hospital bed

There is sufficient evidence showing that the plaintiff would need a hospital bed with high-low function and cof-side railings and mattress which has a life span of eight years and that costs RM2,400. Hence, for 45 years she would need several changes of the bed and the total cost would be RM13,500, and this amount is allowed.

(4) Pressure-relieving mattress

This specialised mattress is necessary for the prevention of bedsores and the cost of it is RM1,000 with a life span of five years. Hence, there would be a total of nine mattresses over 45 years at a total cost of RM9,000, and this amount is allowed.

(v) Wheelchair and commode wheelchair aluminum frame

There are various types of wheelchairs in the market. I find that the one that costs RM1,200 each with a five year life span is sufficient for the plaintiff's use. The commode wheelchair aluminum frame, which is necessary for the plaintiff costs RM933.45 each. Hence the total cost of the wheelchair and commode wheelchair aluminum frame is RM2,133 × 9 = RM19,197, and this amount is allowed.

(6) Wheelchair seat cushion

The plaintiff requires wheelchair sheet cushion that costs RM450 each with a life span of four years. Hence the total cost for this item is RM5,062.50, which is allowed.

A (7) Diapers

The plaintiff needs adult diapers to take care of the bladder and bowel incontinence. The cost per month is RM240. Hence the total cost for 45 years is RM240 × 12 × 45 = RM129,600, and this sum is allowed.

B (8) Urinary catheter

The plaintiff requires urinary catheters to attend to help empty her bladder from time to time and the cost of it per month is RM40. Hence the total cost for 45 years would be RM40 × 12 × 45 = RM21,600, which amount is allowed.

C (9) Incontinence sheets

The plaintiff's mattress needs to be covered with disposable incontinence sheets that cost RM22.50 per month. Hence for 45 years, the total cost is RM22.50 × 12 × 45 = RM12,150, which amount was allowed.

D (x) Clinical gloves

The plaintiff and her caregivers require clinical gloves when cleaning her. The cost per month is RM17. Hence for 45 years, the total cost would be RM17 × 12 × 45 = RM9,180, which amount was allowed.

E (10) Interest

(1) Interest on special damages was fixed at 4% per annum from the date of injury.

F (2) Interest on general damages was fixed at 5% per annum from date of writ till judgment.

(3) Thereafter, at 5% per annum on the entire judgment sum from date of judgment.

(d) Cost

G Cost of the action was fixed at RM50,000 to be borne jointly and severally by all the defendants.

Orders accordingly.

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